The Regulation (EU) 2019/1896 on the European Border and Coast Guard Agency (FRONTEX): preliminary insights on inter-agency cooperation and implications for fundamental rights

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Abstract
Regulations 2016/1624 and 2019/1896 have gradually turned Frontex into the focal point and information and multipurpose hub in EU external border control. They introduce and enhance the legal provisions covering the inter-agency cooperation of Frontex with other EU agencies, with some implications for fundamental rights and accountability obligations. Against the relevant lifting of the new European Border and Coast Guard mandate and staff, the formal recognition of fundamental rights does not guarantee their practical respect.
Less than two years after the adoption of Regulation (EU) 2016/1624, the fourth revision of Frontex regulation was launched. In September 2018, during his speech on the state of the Union, the president of the Commission Jean-Claude Juncker announced the intention to “further strengthen the European Border and Coast Guard to better protect our external borders with an additional 10,000 European border guards by 2020” and “to further develop the European Asylum Agency (EUAA) to make sure that the Member States get more European support in processing asylum seekers”. The new Regulation 2019/1896 was published in the Official Journal of the EU on 14 November 2019 and entered into force on 4 December 2019.

In the last two decades, the multi-level-system of the European Union witnessed an unprecedented proliferation of agencies, causing some authors to speak of an ‘agency fever’ or ‘agencification’ (Levi-Faur). Establishing EU agencies is often justified by the objective of ensuring the correct and uniform implementation of EU policies and legislation. Since its creation in 2004, Frontex has been confronted with both high expectations and severe criticism, a situation that has further intensified in the wake of the current ‘refugee crisis’. While EU policymakers entrusted Frontex with a crucial role in securing the EU’s external borders, other actors, notably human rights groups, the European Parliament (EP) and the European Ombudsman, are concerned about Frontex’s approach towards fundamental rights.

This blog post focuses on the evolution of the Agency’s tasks and their implications for fundamental rights. It includes preliminary insights into the on-going project “EU Border Management. Interagency relations and their impact on fundamental rights”.

**Frontex at work: experimenting EU interagency cooperation and the hotspot approach**

Regulations 2016/1624 and 2019/1896 introduce and reinforce the new EBCG as a guarantor of integrated management of the European borders. In particular, the Regulation 2019/1896 strengthens “interagency cooperation”, namely cooperation between the European Border and Coast Guard Agency (EBCG or Frontex) and other EU agencies, both for sea and land operations.

As for land operations, namely operations at the external borders, art. 2 of Regulation 2016/1624 gave a legal definition to the “crisis points” or “hotspots”, introduced by the 2015 Migration Agenda, to be established where the national authorities face a sudden and disproportionate migratory pressure. Under the hotspot approach, EU agencies such as European Asylum Support Office (EASO), the EU Commission charged Frontex and Europol with on-the-ground operational support to frontline Member States “to swiftly identify, register and fingerprint incoming migrants”. Before that, Frontex had already concluded formal cooperation agreements with the European Agency for Fundamental Rights (FRA) and EASO, but the presence in hotspots, as foreseen in the Joint Operations Triton (2014-2018) and Themis (2018 – ongoing) supporting Italian authorities, and JO Poseidon

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supporting Greek authorities, have sensibly boosted this cooperation. In February 2017, the EASO-Frontex Working Arrangement was complemented by a 2017-2018 Cooperation Plan concerning joint operational activities in the hotspots, and updated in 2019 for the two following years.

According to the new Regulation 2019/1896, the teams deployed in the hotspots are in charge of multiple tasks touching not only on law enforcement competences but also regarding asylum and humanitarian needs. They are tasked with reinforcing the technical and operational assistance by “screening of third-country nationals arriving at the external borders, including the identification, registration, and debriefing (...) and, where requested by the Member State, the fingerprinting (...)” (art. 40, para. 4, Regulation 2019/1896). The teams are also in charge of “initial information to persons who wish to apply for international protection and the referral of those persons to the competent national authorities of the Member State concerned or to the experts deployed by EASO” (art. 40, para. 4, Regulation 2019/1896). Finally, “Migration management support teams shall include, where necessary, staff with expertise in child protection, trafficking in human beings, protection against gender-based persecution or fundamental rights” (art. 40, para. 5, Regulation 2019/1896). Moreover, in the Regulation 2019/1896 the cooperation finds new space: accordingly, “the Agency and EASO should also cooperate in other common operational activities such as shared risk analysis, the collection of statistical data, training, and support to the Member States in connection with contingency planning” (Recital 50).

As for operations at sea, Regulation 2019/1896 formalizes the cooperations that Frontex established since 2016 with the European Fisheries Control Agency (EFCA) and the European Maritime Safety Agency (EMSA) with a “Tripartite Working Agreement”. Cooperation aimed at supporting the Member States in coastguard operations including “maritime safety, security, search and rescue, border control, fisheries control, customs control, general law enforcement and environmental protection.” The areas covered by this specific interagency cooperation include “information sharing, surveillance and communication services, capacity building, risk analysis, capacity sharing.” This development is in line with the definition of security launched with the 2014 European Maritime Security Strategy which aims to advance an “optimal response to threats” through the cross-cooperation between Member States’ authorities and EU agencies, given that “Each Member State has, over time, developed its own systems, structures, and approach to its maritime security, with no single method for success”. Regulation 2019/1896 states that “the Agency shall, in cooperation with EFCA and EMSA (European Maritime Safety Agency), support national authorities carrying out coast guard functions at national and Union level and, where appropriate, at international level (art. 69, para. 1), provided that “The Agency, EFCA and EMSA (...) use information received in the context of their cooperation only within the limits of their legal framework and in compliance with fundamental rights, including data protection requirements.” (art. 69, para. 2). Indeed, EBCG “may process personal data” only for specific purposes (Art. 87, para. 1, Regulation 2019/1896) such as “facilitating the exchange of information with Member States, the Commission, the EEAS (European External Action Service) and the following Union bodies, offices and agencies and international organisations: EASO, the European Union Satellite Centre, EFCA, EMSA, EASA (European Union Aviation Safety Agency) and the Network Manager of the EATMEN (European Air Traffic Management Network)” (Art. 87, para. 1 c, Regulation 2019/1896).
Implications for accountability obligations and fundamental rights protection

These processes enhanced cooperation between agencies operating in the Area of Freedom, Security and Justice (AFSJ), and dealing with policy issues under intergovernmental control and privilege experimentalist and non-legislative forms of practical cooperation (Monar 2010). Not surprisingly, a number of concrete implications on data sharing and legal accountability on human rights principles emerge. So far, Member States retain executive powers of activities within the hotspot, but EU agencies were increasingly involved in processing registration and asylum demands since disembarkation phases, which may blur the definition of who is accountable for what. Regulation 2019/1896 introduces a permanent, fully trained and operational Standing Corps of 5,000 Border Guards by 2021 and 10,000 by 2027 based on the distribution key set out in its Annex I. It awards executive powers to the EBCG’s standing corps such as verifying the identity and nationality of persons, authorising or refusing of entry upon border check, stamping of travel documents, issuing or refusing of visas, patrolling or, registering fingerprints (art. 55, para. 7, Regulation 2019/1896). While this represents a potential breach of Member States’ responsibility of their inner security, it also leaves many concerns on how to whom the Agency is accountable to, and how to improve monitoring of the Agency’s compliance to fundamental rights during operations. Moreover, in the context of inter-agency cooperation and the boosted cooperation of Frontex with third countries (both in return operations and in the establishment of Liaison officers in addition to the already on place), Agency’s operational activities and degree of discretion are increasingly difficult to control.

Hotspots were mentioned in a legally binding document only in the EBCG Regulation 2016/1624, which, in order to give cooperation between agencies a kind of formalisation, introduced the Migration Management Support Teams (art. 2, para. 4). As a report commissioned by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) stresses, due to the lack of a broader legal framework regulating hotspots activities and the pre-eminence of individual agencies’ regulations for the establishment of the hotspot governance, any amendment to an agency regulation changes the overall architecture and can create an inter-agency competition in the hotspot context, as it happened with the new Regulation 2019/1896 EBCG, which enhanced Frontex powers and staff, thereby putting “an undue focus on border control over the obligation to provide international protection” (Rijpma 2016).

Moreover, with regard to cooperation at sea, in the context of information sharing between Common Security and Defence Policy (CSDP) missions and Justice and Home Affairs (JHA) agencies, JHA agencies increased their role in defense policies and became part of the EU conflict and crisis management. Cooperation on information sharing also contributes to projecting internal norms and home affairs priorities on EU’s external actions and cooperation with third countries. The Commission, through the enhanced role of agencies around the European Border and Coast Guard, used as the main example on how “to protect Europe, respond to external crises, and assist in developing our partners’ security and defence capacities”, paves its way to influence policies beyond the formal intergovernmental structure of the Common Foreign and Security Policies (CFSP) (Riddervold 2018).

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1 Hotspots activities are regulated by non-legally binding standard operating procedures set by the Italian and Greek the Interior Ministry respectively.
This does not come without consequences. Both Regulations 2016/1624 and 2019/1896, while committing the Agency to fundamental rights norms (and indirectly referring to the European Union Agency for Fundamental Rights, FRA), turned Frontex into the focal point and information and “multipurpose hub” (Vitiello 2019) in EU external border control. Moreover, during land operations, the situation on the ground during operations is blurred and not as clear-cut as operational plans and official documents outline, with a blurring of “who is doing what” between agencies. A relevant implication of such changes is the need to strengthen the accountability of the Agency against the background of possible human rights violations that may arise during its operations. Accountability and monitoring mechanisms on Frontex compliance with human rights principles during operations are narrowed or limited in powers and resources. On paper, some mechanisms are existing, The Regulation 2011/1168 introduced two monitoring and advising instruments to “mainstream fundamental rights” within the Agency: the Frontex Fundamental Rights Officer (FRO) and the Frontex Consultative Forum (art. 26). The FRO is the real monitoring body, while the Consultative Forum is a network of EU agencies and organisations having a consultancy role. The FRO is in charge of complaints mechanisms and is responsible for handling complaints filed by third-country nationals when violations of fundamental rights alleged to have occurred in the course of the Agency’s operations. The FRO is also the advising body overseeing Joint Operations operational plans, fundamental rights strategy, and is advising on training, being also the core element of Pool of forced-return monitors (art. 29, Regulation 2016/1624). Nevertheless, as the Frontex Consultative Forum on fundamental rights stresses in its annual reports, Regulation 2019/1896 comprises scaling up of the Agency’s staff without adequate increase in the Fundamental Rights Officer staffing. In addition to that, nor the European Agency for Fundamental Rights, nor the FRO or the Consultative Forum have monitoring roles over inter-agency cooperation, with FRA and EASO even being mandatory members of the Consultative Forum (art. 108, para. 2, Regulation 2019/1624). Indeed, evaluation of inter-agency cooperation is left to the European Commission (art. 121, para. 1 Regulation 2019/1624).

To sum up, given the under-specified framework, EU agencies’ broad mandate provides them with unprecedented monitoring powers over member states’ compliance towards EU hard law with reference to external border management (fingerprinting) and European asylum system which makes it more difficult for frontline countries to evade their EU obligation. Besides the enhanced supranational dynamic that follows from operational mandates set by EBCG Regulations, the strong role of executive agencies may also create challenges in terms of human rights and accountability.